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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1945.

No. 1260.

MARIE COOPER DIECKHAUS,
Petitioner,

vs.

TWENTIETH CENTURY-FOX FILM CORPORATION.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

In the Petition for a Writ of Certiorari, petitioner relied upon the decisions of other courts with which the majority opinion in the court below is in conflict, on the questions of proof of access (Pet. 22-29) and public domain as a defense to the charge of infringement (Pet. 29-31). Petitioner urged that these decisions represented the uniform holding of every court which had passed upon the issues involved and were consistent with the sympathetic attitude manifested by the Missouri courts toward the protection of an author in his common law copyright (Pet. 17,

20, 22); that there were no local, or other, considerations rendering the decisions inapplicable in this case; and that no such considerations were referred to, or relied upon, by the majority of the court below. In ignoring these rulings and in rendering a decision in conflict therewith, whose effect is, in substance, to destroy the protection heretofore afforded by common law copyright, the Court of Appeals failed to apply the Missouri law as required by Erie R. Co. v. Tompkins (Pet. 17-21). Moreover, the majority invaded the province of the trier of fact by substituting their own views regarding the credibility of witnesses and the weight of the evidence for those of the trial judge, whose findings were based upon substantial evidence in the record—a procedure which nullified the division of function between trial and appellate courts established by Rule 52 (a) of the Rules of Civil Procedure.

Defendant, in opposing review of the case by this Court, does not take issue with the decisions relied upon by petitioner; does not cite any contrary holdings; and does not challenge petitioner's assertion that her cases represent the uniform decisions and are grounded upon sound reasons of policy. Defendant contends only that this case does not present the questions which petitioner urges were incorrectly decided. Accordingly, this reply brief deals with the issues as thus limited.

I. **Proof of Access.**

The majority of the court below held that the decree of the trial court for the plaintiff was based upon an "error of law" (Twentieth Century-Fox Film Corp. v. Dieckhaus, 153 F. [2d] 893, 900 [C. C. A. 8]; R. 2043). The error referred to was the trial judge's finding of access. This finding was based upon evidence showing the possibility of physical access by the defendant to plaintiff's book plus similarities between the book and defendant's motion picture which, in the words of the trial judge, were "too

numerous and glaring to be the result of coincidence" (54 F. Supp. 425, 431-32; R. 1440-41) and, in those of Judge Johnsen in the court below, "such in number and character that coincidence was not on its face a natural and satisfying explanation for them" (153 F. [2d] 893, 901; 2044-45).

The trial court, in its findings, required more than eight pages of the record to list the similarities, even though the judge noted that they were set forth "very briefly" (R. 1644-52). They consisted of identities of incident—more than seventeen incidents, of basic importance to the development and treatment of the plot—of characters, dramatic situation and locale. Without the similarities of "plot, expressed ideas, dramatic situations, scenes, episodes, incidents, characters, and treatment thereof contained in plaintiff's composition" (R. 1644), the scenario of defendant's motion picture would be reduced below skeleton proportions.

Cogent reasons have led courts to hold that access may be proved by circumstantial evidence, including similarities between the two works of such a character that coincidence is not a satisfying explanation (Pet. 22-29). Several have stated expressly that similarities alone—without other proof—may be sufficient evidence of access. (See Pet. 27-28, 23 f. n.) In this case, as the trial court noted, there was more. In addition to the similarities, the evidence showed that (as stated by Judge Johnsen in the court below) "during the period that defendant's movie script was in process of preparation at its studio, appellee's [plaintiff's] book was in Hollywood, in the hands of a literary agent and critic, whose staff [consisting of eight or nine employees who read manuscripts and wrote and sold stories] had access to it; and another critic to whom the book previously had been submitted and who, accord-

ing to appellee, had suggested that it could be used as a vehicle for Irving Berlin's songs, was then also located in Hollywood".

In literary property cases, the principles of proof are the same as in other cases. Plaintiff must adduce evidence of access; but such evidence, as in other fields of law, may be direct or circumstantial. Its weight is for the trier of facts to determine, subject to review under the requirements of Rule 52 (a) of the Rules of Civil Procedure. Isolated and dissected, the weight of a particular item of evidence may be relatively slight. Viewed cumulatively and in the aggregate, in the light of human knowledge and experience, the varied segements may possess convincing and persuasive force. In this case, the denials of defendant's witnesses provided evidence which the trial court was required to, and did, consider together with the other evidence presented by the parties (R. 1643). The trial judge was not required to swallow and believe the denials of defendant's writers who had a direct and acute interest, financial as well as professional, in the result. Questions of credibility were for him to determine; and he decided them adversely to the defendant. Another court, shortly before had similarly denied weight to the denials of copying by several of the same witnesses, under similar circumstances. **Stonesifer v. Twentieth Century-Fox Film Corp.**, 140 F. (2d) 579 (C. C. A. 9).

The majority of the court below explicitly declared that, in this case, the trial court could not, as a matter of law, find access proved. Judge Johnsen's exposition of the correct principles of law on the subject of access indicated that this was his understanding of the majority opinion. So construed, the decision is in square conflict with the uniform holdings of other courts, in this country and in England.

II. Public Domain.

Other courts have uniformly ruled that a defendant who seeks to defend upon the theory of use of sources in the public domain must affirmatively show that the material, alleged to have been pirated, was in fact taken from sources in the public domain rather than from plaintiff's work (Pet. 29-31). It is not enough that such material existed in the public domain, if it was not used. Defendant cites no cases to the contrary; it contends only that the question is not presented.

Defendant states that public domain is of importance in an infringement suit solely because it tends to fortify defendant's denial of access and copying and weakens the force of the inference to be derived from similarities. If this is conceded, the cases are nevertheless applicable. The existence of such sources does not fortify defendant's denial nor weaken the inference of copying, unless defendant actually resorted to such sources. In this case, not only did defendant make no such contention at the trial, but instead vigorously asserted that the story in its entirety was original with it (Pet. 30).

It should be noted that acceptance of defendant's contention regarding the nature of the issue of public domain strengthens petitioner's position herein. If it merely affects the force of the inference from similarities or serves to fortify defendant's denials of copying, then it is subordinate to the issue of access and does not provide an independent basis upon which to rest the decision of the court below. Since, as previously noted, the majority opinion cannot stand on the issue of access, its sole support fails.

III. Application of Missouri Law.

Petitioner urged that the Court of Appeals failed to apply the Missouri law to the questions which it should control and instead applied legal concepts which no court anywhere had ever adopted (Pet. 17-20). Defendant's contention on this point amounts to an argument that the court below applied Missouri law because it said it did.

Compliance with the mandate of Erie R. Co. v. Tompkins is not, of course, attained by lip service alone. Recognition by a court of its duty to apply the state law is normally the first step. But where, as here, performance does not follow the avowal, the rule has, nevertheless, been violated. For a federal court to attempt to impose its own rules of law regarding access and public domain, as destructive as they are novel, upon the law of Missouri can only be regarded as a failure to apply the state law.

IV. Rule 52 (a) of Rules of Civil Procedure.

How the court below evaded the requirements of Rule 52 (a) of the Rules of Civil Procedure has been indicated in the Petition for the Writ of Certiorari (31-36). Defendant's contention on this point resolves itself into a count of the number of witnesses who presented their testimony verbally during the course of the trial.

To the extent that numbers make a difference, it may be noted that all of the "live" witnesses appeared for petitioner; their testimony supported her claim to authorship of the book several years before defendant produced its motion picture; and the decision of the trial court reflects favorably upon their credibility. However, the division of function between trial and appellate courts established by Rule 52 (a) does not rest upon so uncertain and shifting a basis as a count of the noses of the

witnesses who take the stand as contrasted with those who testify by deposition. The duty of passing upon the credibility and veracity of witnesses is not taken from the trial judge and vested in the appellate tribunal because only four "live" witnesses appear. The sound considerations of policy which confine the scope of review by the appellate tribunal are manifest in a case of this type, where various tactical moves in the course of a proceeding—such as defendant's charge of fraud on the motion to reopen—can best be understood and appraised in their setting by the trial judge who has conducted the trial and watched the case unfold from day to day (Pet. 34-35).

V. The Charge of Fraud.

It will be recalled that defendant, having lost at the trial in a defense based on the theory that there was no copying and "that there were no similarities", sought the privilege of retrying the case on the theory that there had been copying but that plaintiff, not defendant, was the literary pirate (Pet. 10). Defendant admits that "at the original hearings in December, 1942, and January, 1943, these matters were not pressed upon the District Court" (Defendant's Brief, 12-13), although the evidence on which defendant's ex parte statements were based was available at that time.

Defendant states that, when it first presented the charge of fraud in the motion to reopen, "plaintiff's counsel * * * did not then seek exoneration" (Defendant's Brief, 4). The truth is just the reverse. Plaintiff not only promptly sought exoneration, presenting evidence to meet every specific charge of fraud (R. 1583-1609), but was in fact exonerated by the trial court. After conceding that it did not offer the evidence at the trial, defendant avers that its affidavits were offered "before any judgment was ever entered, and the District Court should not have ignored them" (Defend-

ant's Brief, 13). The record shows that, far from ignoring defendant's contention, the trial judge gave the issue careful and exhaustive consideration not once, but on several occasions. The motion to reopen was argued orally on June 30, 1944, and thereafter briefs were submitted by the parties. The matter was then taken under submission, and the motion overruled on December 29, 1944 (R. 1639). Again, the charge of fraud was considered in connection with defendant's request for findings of fact (R. 1737) and in the motion for a new trial (R. 1656), filed on January 8, 1945. On February 7, 1945, the court heard further arguments; the matters were submitted, the motions being overruled on March 21, 1945 (R. 1995).

Conclusion.

The questions regarding the application of the rule of Erie R. Co. v. Tompkins and the division of function between the trial and appellate tribunals, raised by this case, are of major importance in the administration of justice in the federal courts. The decision of the majority of the court below overturns existing principles of law applicable to statutory, as well as common law, copyright and destroys the protection which the law has heretofore afforded an author in his literary property. The conflict of decisions thus produced has no basis in considerations of a local nature. For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX.

Several cases referred to in the Petition have now been reported. The citations are set forth herewith for the convenience of the court:

Arnstein v. Cole Porter, 154 F. 2d 464 (C. C. A. 2);
Dieckhaus v. Twentieth Century-Fox Film Corp., 153 F. 2d 893 (C. C. A. 8);
Heim v. Universal Pictures Co., 154 F. 2d 480 (C. C. A. 2).